Supreme Court, U.S.
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No. 89-936

In The

Supreme Court of the United States

October Term, 1989

INF, LTD.,

Petitioner,

v.

SPECTRO ALLOYS CORP.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

When the Interstate Commerce Commission, pursuant to a referral order from a district court as a matter within the Commission's primary jurisdiction, rules that it would be an unreasonable practice to require a shipper to pay to a motor carrier as undercharges the difference between the tariff charges and those negotiated by the parties and reasonably relied upon by the shipper, and there is no claim that the Commission's ruling was arbitrary, capricious, or not supported by substantial evidence, may the district court nevertheless disregard the Commission's ruling, and require the shipper to pay the undercharges?

LIST OF PARTIES

Appellant below was Spectro Alloys, Corp., a Minnesota corporation, the shipper. Appellee was INF, Ltd., a Minnesota based motor carrier and a subsidiary of Indianhead Truck Line, Inc., a Wisconsin corporation.

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OPINIONS OF COURTS AND ADMINISTRATIVE AGENCY BELOW

The August 5, 1989, opinion of the United States Court of Appeals for the Eighth Circuit here sought to be reviewed is reported at 881 F.2d 546, and appears at Pet. A-1. The September 15, 1989, order of the United States Court of Appeals for the Eighth Circuit denying rehearing is unreported, but appears at Pet. A-10.

The Memorandum Opinion and Order of the United States District Court, District of Minnesota, of July 8, 1988, dealing with the parties' respective summary judgment motions after referral is reported at 690 F. Supp. 808, and appears at Pet. A-11.

The February 23, 1988, Order of the Interstate Commerce Commission in its Docket MC-C-30041, *INF LTD. – Petition For Declaratory Order* upon referral is unreported but appears at Pet. A-24.

The January 30, 1987, Order of the United States District Court, District of Minnesota, in its Civil No. 4-86-705, referring the question to the Interstate Commerce Commission is reported at 651 F. Supp. 1405, and appears at Pet. A-17.

JURISDICTION

The jurisdictional requisites are asserted in Pet. 2.

STATUTES INVOLVED

49 U.S.C. 10701 Standards for Rates, Classifications, Through Routes, Rules, And Practices

> (a) A rate (other than a rail rate) classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. . . .

49 U.S.C. 10761 Transportation Prohibited Without Tariff

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

RESTATEMENT OF THE CASE

INF, an ICC certificated motor carrier, performed certain transportation services for Spectro in 1983 and 1984 assessing therefore charges which ICC later found to have been negotiated between Spectro and INF's president, its top management official who was then soliciting traffic other motor carriers were handling, and which negotiated rates Spectro relied upon in tendering the

traffic to INF, there being competitive alternatives available to Spectro. INF did not file with ICC a tariff containing the negotiated rates, but contemporaneously billed Spectro for and received compensation in accordance with the negotiated rates (Pet. A-31-2). In 1986 INF commenced a lawsuit against Spectro for $22,500.00 representing as asserted undercharges the difference between what INF charged and received and what its filed tariffs would have called for.

The United States District Court for the District of Minnesota granted Spectro's motion to refer to ICC as a matter within its primary jurisdiction the question of the reasonableness of the practice of requiring INF to pay such undercharges in the circumstances (Pet. A-23). The parties submitted their respective views of the facts and the law to ICC which found that in this instance, it is an unreasonable practice for INF to collect the alleged undercharges (Pet. A-32).

Upon motions by both parties, the district court granted INF's motion for summary judgment, and denied that of Spectro (Pet. A-16). No assertion was made by INF that ICC's ruling was arbitrary, capricious, or not supported by substantial evidence, nor did INF seek review of ICC's ruling as such, asserting instead that as a matter of law the district court could not do otherwise according to the filed rate doctrine.

Upon appeal by Spectro, the United States Court of Appeals for the Eighth Circuit ruled that since the district court erred in holding that it was bound by the filed rate doctrine and could not accept ICC's decision, and no

other issue was raised than this legal question, the district court's order granting INF's summary judgment motion had to be reversed and the matter remanded to the district court with instructions to grant Spectro's summary judgment motion (Pet. A-9). This remand has since been complied with, the judgment for INF vacated, and judgment for Spectro with costs against INF entered by the district court.

ARGUMENT

A. Summary

The Court of Appeals committed no error in deciding as it did (in conjunction with its decision in *Maislin Industries, U.S. Inc., v. Primary Steel Inc.*, 879 F.2d 400 [8th Cir. 1989], pet. for cert. pending, argued the same day) that since such matters as the reasonableness of a carrier's billing practices and efforts to collect undercharges are matters involving the special expertise of ICC and are therefore within its primary jurisdiction, the district court erred in holding that it must nevertheless require Spectro to pay the undercharges sought under the filed rate doctrine, and that since only this legal question was before the court (there being no issue as to whether the ICC's ruling was arbitrary, capricious, or not supported by substantial evidence) summary judgment for Spectro is required.

The proper authority to harmonize the provisions of the Interstate Commerce Act, 49 U.S.C. 10701(a) requiring that carrier practices be reasonable, and 49 U.S.C. 10761(a) requiring that tariff rates be assessed, is the

Commission. In this instance, as in *Maislin*, the Commission properly resolved the two statutory provisions by holding that the collection practices of this carrier were unreasonable.

In asserting otherwise, petitioner argues (1) that the decision below conflicts with prior decisions of this court, (2) that the federal courts are irreconcilably split, and (3) that the decision below is in conflict with the intent of the Motor Carrier Act of 1980. INF does not argue here that the referral order issued by the district court was erroneous, or that the Commission's order was capricious, arbitrary, or not supported by substantial evidence. These points will be addressed below.

B. The Ruling Below Is Entirely Consistent With Prior Rulings Of This Court

Petitioner asserts that *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) requires that "[d]eviation from [a filed rate] is not permitted upon any pretext." (Pet. 10.) Petitioner omits, however, the portion of the cited passage which completes the sentence: "unless it is found by the Commission to be unreasonable". The omission is significant since the decisions of this court upon which petitioner relies do not include any in which the Commission has considered and ruled upon the reasonableness of a carrier's rates or practices pursuant to its authority to do so under 49 U.S.C. 10701(a). Thus, *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) involving the question whether anti-trust sanctions may lie against carriers or their rate bureau with respect to filed rates allegedly arrived at in restraint of trade,

does not reach the question of rates or practices held by the Commission to be unreasonable. Similarly the Eighth Circuit cases relied upon by petitioner, *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986) and *Missouri Pac. R.R. v. Rutledge Oil Co.*, 669 F.2d 557 (8th Cir. 1982) involving claims to the *court* of improper behavior by the carriers, did not invoke questions of unreasonable carrier practices as determined by the *Commission* under the Interstate Commerce Act.

It is asserted that the Commission has no power to waive undercharges according to *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). This in no way mitigates against the ruling below because the Court of Appeals carefully observed the proper balance of responsibility between the courts and the Commission under the provisions of the Interstate Commerce Act. Section 10701 grants the Commission, and not the courts authority to determine reasonableness under such circumstances as a matter within the Commission's primary jurisdiction. *Maislin Industries, U.S. Inc., v. Primary Steel, Inc.*, supra, *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65 (1956), *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-306 (1976), and *General Am. Tank Car Co. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-432 (1940). This function is strictly one for the Commission to perform, and courts have no role to play in this phase.

Having done so, however, it is not the Commission but the court which has the power and the responsibility to accept the Commission's advice in the matter and then to enforce the Commission's ruling, unless it is persuaded that the Commission acted capriciously, arbitrarily, or that there was no substantial evidence to support what

the Commission did, a matter as to which there is no issue here. As was noted by the Court of Appeals in *Maislin*, supra, 879 F.2d at 405, *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982) aptly illustrates the interaction between the Commission and the courts when questions of collection of motor carrier rates and reasonableness of carrier rates or practices are involved. The shipper wishing to have a determination of unreasonableness, should ask the court for a referral of the reasonableness question to the Commission, and the court, after having received the Commission's advice, may subsequently grant relief to the shipper.

Petitioner asserts that the sole remedy available to the shipper is to pay the higher charges, and then begin a civil action for reparations, which then may call for a Commission referral. While such may be one means, it is not at all the only way for a shipper to secure relief. In fact, in such a case as this, a shipper would be badly advised to select such a course of action because he would have paid in funds to a carrier which would be unable to refund them should the shipper ultimately prevail in his reparations action since the carrier is defunct, and is the subsidiary of a bankrupt entity. If such were the only procedure available, the procedure would have destroyed the remedy. In *Western Transp. Co.*, supra, the Seventh Circuit certainly approved of the same sort of procedure that was followed here, that of seeking a referral to the Commission of the reasonableness question after being sued for undercharges.

Petitioner suggests that such referral procedures are available only as to questions of rate reasonableness, not practice reasonableness. This court approved of having a

claim of past practice unreasonableness be referred to the Commission in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962). The provisions of 49 U.S.C. 10701(a) requiring reasonableness as to motor carrier rates and practices are found in the same sentence without differentiation. There is no rational basis upon which to differentiate them.

C. No Showing Of Irreconcilable Conflict Is Made

Petitioner's only suggestion of conflict within the Courts of Appeal refers to the Fifth Circuit's opinion in *Matter of Caravan Refrigerated Express, Inc.*, 864 F.2d 388 (5th Cir. 1989 pet. for cert. pending) and the Eighth Circuit decisions in this and the *Maislin* opinion, supra. The *Caravan* matter differs from the Eighth Circuit decisions in that *Caravan* did not involve a Commission decision upon a referred reasonableness question. The instant controversy presents the narrower question what the district court should do after having secured the advice it sought from the Commission. *Caravan* does not involve that question. While the shipper in *Caravan* may have believed he should have been given a referral order, such is not the issue in the matter at hand.

A more meaningful recitation of the harmony of the Circuit Courts of Appeal would include *Seaboard System R.R. v. United States*, 794 F.2d 635 (11th Cir. 1986) in which the Eleventh Circuit held it to be correct for the Commission to review and rule that it would be an unreasonable practice for a carrier to attempt to collect charges based on an unambiguous, although unclear, tariff, and for a court to rule subsequently that such undercharges should

not be collected. Also omitted by petitioner is *Western Transp. Co.*, supra, in which the Seventh Circuit held that if a shipper, sued for undercharges, complains that in this instance, the imposition of a "shipper's load and count" notation requirement in order to qualify for a lower rate was unreasonable, the court should refer the question to the Commission for its determination of the question.

The inclusion of these Eleventh and Seventh Circuit decisions which are totally in harmony with the Eighth Circuit decisions here involved shows a lack of conflict between the circuits.

Petitioner also points to various district court decisions in some of which referral orders were issued, and in others denied. There are such different results, but some fact situations may not present appropriate cases for referral of the reasonableness question, perhaps, for example, because the initial submission to the court did not present a strong enough case of the existence of such a question to warrant referral. There may be cases as to which no referral order should be granted even though primary jurisdiction in the Commission to determine such reasonableness questions is recognized.

D. The Opinion Below Is Totally In Harmony With The Intent Of The Motor Carrier Act of 1980

Petitioner argues that the decision below conflicts with the intent of the Motor Carrier Act of 1980. In doing so petitioner seems to argue from legislative history that Commission discretion was eliminated by that statute. Such can hardly be the case.

In *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) this court held:

> . . . the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

It can hardly be thought that the passage of the Motor Carrier Act of 1980 was supposed to change the Commission's role as a regulatory agency in such a manner as to render it unable to react to changing conditions and circumstances and to be forever bound to maintain its old policies and rulings until such time as Congress may see fit to change the Act. A Commission so bound would be of little use to serve the Nation's needs.

When the Commission departs from its settled precedent, it must explain its departure in a manner sufficient to permit judicial review of its policies, *Seaboard System R.R., Inc. v. United States*, supra, 794 F.2d at 639, *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). No claim is made that the Commission has failed to do so. See *Petition to Inst. Rulemaking On Negotiated Motor Common Carrier Rates*, 3 ICC 2d 99 (1986), 5 ICC 2d 623 (1989). The changed competitive circumstances in the transportation industry and the corresponding lessening in importance of the likelihood of discrimination in the absence of formerly existing

monopolistic conditions, and the need in the public interest for the Commission to be able to adjust to such changed conditions are too well documented and understood to warrant further discussion.

CONCLUSION

The petition fails to show with the sufficiency required why the United States Supreme Court should undertake review of the Court of Appeals' decision. Its opinion is well founded in law, and does not conflict with those of other Circuit Courts of Appeal. The result of the decision below is fair and consistent with the realities of today's transportation circumstances, and satisfactorily enables the Interstate Commerce Commission to perform its role as a regulatory agency dealing with current events and economic conditions in the Nation's interest. The petition should be denied in its entirety.

Respectfully submitted,

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